Locke v. *Furze* could not have been assigned, though the *interesse termini* itself clearly might (Co. Litt. 46 b); so that, if the lessee had assigned his right under the *interesse termini*, the right of action on the covenant would have been lost; for it should seem that, under such circumstances, the assignor could not sue: *Beely* v. *Parry*, 3 Lev. 154; *Green* v. *James*, 6 M. & W. 656. The case of *Locke* v. *Furze* is one deserving the attention of conveyancers; and it may, perhaps, appear not so easy to reconcile the decision with established principles, as the unanimity of the two courts before which the subject has been brought, would seem to imply.—*Solicitors' Journal.*

Vice-Chancellor Stuart's Court.

LOVETT *v.* HANKINS.

An agreement to take, in lieu of arrears of income, in respect of a life interest, recoverable in equity, a certain sum, less than the estimated amount of such arrears, recoverable at law, is, in equity, void for want of consideration, and will not be supported.

THIS suit was instituted for the purpose of setting aside two agreements, of the 2d and 11th of May 1864 respectively, the first having been entered into between the plaintiff, Mary Lovett, widow, and Thomas Hankins, her brother, who died between the dates of the two agreements, and the second having been signed by the plaintiff after her brother's death at the instance of his representatives, who were the principal defendants in the suit. The circumstances which led to these agreements being signed were as follows:—Joseph Hankins, father of the plaintiff and Thomas Hankins, by his will, dated December 17th 1823, directed a sale of certain real estates, and bequeathed one-third of the proceeds to Thomas Hankins, one-third in trust for the plaintiff for life, with remainder for the benefit of her children (if any), and if none, as to one moiety of the plaintiff's share, to Thomas Hankins absolutely, and as to the other moiety upon such trusts as were declared of the remaining one-third part, which he bequeathed in trust for another daughter, Sarah Penner, for life, with remainder to her children. After the death of the testator (which occurred in 1824) the trustees of his will agreed with Thomas Hankins for sale to him of the real estate for 19,700*l.* At the time of this sale Thomas Hankins only paid 1320*l.* 10*s.*, which went to clear off encumbrances on the estate. Of the remaining purchase-money (18,379*l.* 10*s.*), a part, viz., 1002*l.*,

represented a legacy charged by the testator on his real estate, and the ultimate remainder of 17,377*l.* 10*s.* represented the residuary proceeds of the sale to be divided in thirds and appropriated as above mentioned. It was agreed at the time that Thomas Hankins should retain 5792*l.* 10*s.* (being his own third part), and should grant a mortgage to the trustees of the will to secure the legacy, and also the two-third parts or shares of his sisters, the plaintiff and Sarah Penner.

To carry this arrangement into effect, Thomas Hankins, by an indenture dated 14th May 1835, mortgaged the estates to the trustees for one thousand years, to secure the same sums with interest at 4*l.* per cent. Shortly afterwards the legacy was paid.

The plaintiff at the time of the hearing was about seventy-four years old, and had never had a child. Sarah Penner had children who were interested in remainder under the will of the testator.

Shortly after the date of the mortgage above mentioned, Thomas Hankins purchased the reversionary interests of all the children of Sarah Penner, in the sum of 11,585*l.* (being the sum in which the plaintiff and Sarah Penner were interested in moieties during their respective lives), and so became absolutely entitled to that sum, subject only to the respective life interests of the plaintiff and Sarah Penner therein. In order to raise the sum necessary for purchasing these interests, Thomas Hankins was obliged to mortgage the estate, which he did by an indenture dated 17th November 1852, his sisters, the plaintiff and Sarah Penner, joining therein for the purpose of postponing their security for the 11,585*l.*

By another indenture, dated the same 17th November, Thomas Hankins assigned all the rents and profits of the estate which should accrue during the life of the plaintiff and Sarah Penner (subject to the mortgage of even date) to the surviving trustee of the will of the testator upon trust to satisfy and keep down the interest to become thereafter due to the plaintiff and Sarah Penner.

Sarah Penner died in 1853.

Subsequently to the last-mentioned deed Thomas Hankins made the plaintiff unequal payments on account of her life interest, the income of which fell considerably into arrear.

Thomas Hankins died in May 1864, having made a will whereby he devised his real estate to his sons, Thomas and William Han-

kins, and his son-in-law, Richard Hobbs, in trust for all his children (two sons and three daughters) in equal shares.

The bill stated that a few days before the death of Thomas Hankins, his son William Hankins came to plaintiff and asked her to sign an agreement to take 1000*l.* (a sum less than the estimated amount of arrears) in discharge of all arrears. The plaintiff was then ill and in bed, and supposing that her brother, Thomas Hankins, was in difficulties, and knowing that he was dying, she consented to sign, and did sign, the first agreement, whereby she agreed to take 1000*l.* in full of all arrears, and Thomas Hankins agreed to pay the plaintiff 1000*l.* with interest at 4*l.* per cent., on the plaintiff giving him twelve months' notice requiring payment thereof. And the plaintiff agreed to give to Thomas Hankins, on payment of 1000*l.* and interest, a receipt for the arrears of her annuity up to the day of the agreement.

The bill proceeded to state that after the death of Thomas Hankins, William Hankins and Richard Hobbs induced the plaintiff to consent to give up her claim for interest on the 1000*l.*, telling her that it was the only plan to avoid leaving her brother's debts unpaid, and she accordingly signed the second agreement, dated the 11th May 1864, releasing her claim for interest

The plaintiff alleged that she was induced by misrepresentation to sign these agreements, and that there was, in fact, no consideration for them. The defendants to the suit were the two sons and three daughters of Thomas Hankins, the respective husbands of two of the daughters, and the representatives of the last surviving trustee of the will of the original testator, who was also trustee of the securities given by Thomas Hankins for the plaintiff's life interest.

Malins, Q. C., and *B. Rogers*, for the plaintiff, contended that the agreements could not stand. They were wholly without consideration. They cited *Cumber* v. *Wane*, 1 Str. and 1 Sm. Lead. Cas. new ed. 288; *Heathcote* v. *Crookshanks*, 2 T. R. 24, 27; *Fitch* v. *Sutton*, 5 East 230; *Cross* v. *Sprigg*, 6 Ha. 552, 555; *Peace* v. *Hains*, 11 Id. 151.

Bacon, Q. C., and *De Longueville Giffard*, for some of the principal defendants, argued that there was a consideration for these agreements. Previously the plaintiff had only a general charge in equity for whatever arrears she could claim. The first

agreement gave her a distinct legal right to a fixed sum. These agreements were such as would be enforced at law, and there was no ground for setting them aside in equity. They also referred to *Cumber* v. *Wane*, loc. cit.

Archibald Smith, for other defendants in the same interest, cited *Topham* v. *Morecraft*, 8 Ell. & Bl. 972, and commented upon *Peace* v. *Hains*, loc. cit.

Freeman and *Phear*, for the representatives of the last surviving trustee of the will of Joseph Hankins.

STUART, V. C., said that he could not but hold that both agreements had been executed under such circumstances that they could not be supported in equity. The counsel for the defendants had not attempted to uphold the second agreement, but as to the first an attempt had been made to show that it was founded upon a sufficient consideration. It was argued that, before that agreement, the plaintiff had only a right enforceable in equity, and that the effect of that agreement was to give her a remedy at law. His Honor was not aware of any authority for saying that an agreement to take 500*l.* recoverable at law for 1000*l.*, recoverable in equity, could be said to be founded upon a sufficient consideration. Again, it had been contended that this agreement was one which would be enforced at law: it might be so, but it was not necessarily, on that account, valid in equity. His Honor made a declaration that the two agreements were invalid and ought to be set aside, and directed an account of what was due to the plaintiff for arrears of her life interest.

It was decided in the leading case of *Cumber* v. *Wane*, 1 Sm. Lead. Cas. 439, that the acceptance of a smaller sum cannot be pleaded in an action for a larger amount; and this doctrine has been so frequently acted upon in subsequent cases that it has come to be regarded as one of the *non tangenda non movenda* of our legal system. But while the lawyers of the present day display such unbounded respect for the memory of Lord CAMDEN (who pronounced the decision in *Cumber* v. *Wane*), they have engrafted so many exceptions upon the original rule, that the doctrine seems to be fast disappearing beneath the embellishments which time and legal ingenuity have added to its own simple outline.

The first class of exceptions to the general rule appears to have originated in *Longridge* v. *Dorville*, 5 B. & A. 117, where it was held that the doctrine in *Cumber* v. *Wane* should not be considered as extending to claims for unliquidated damages. This case has been followed by a multitude of decisions founded upon some microscopic perception that the plaintiff's demand was a hair's breadth more or less unliquidated, or was disputed: *Edwards* v. *Baugh*, 11 M. & W.

641. The joint result of the decisions in *Cumber* v. *Wane*, *Longridge* v. *Dorville*, and *Edwards* v. *Baugh*, accordingly, has been that few cases of settlements of disputed accounts are not open to the objection that they are not strictly within the letter of the ruling in *Cumber* v. *Wane*. So that, to use the words of Mr. J. W. Smith (Sm. Lead. Cas. 444), "If there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement." The doctrine in *Cumber* v. *Wane*, in fact, appears to have been founded upon the civil law, which inquired into the adequacy of the consideration; while the numerous exceptions to that leading case are more in accordance with our common-law doctrines, which have always eschewed such inquiries.

The greatest recorded departure from the principle of *Cumber* v. *Wane* occurred in the case of *Sibree* v. *Tripp*, 15 M. & W. 23. The action in the former case was on a promissory note given in satisfaction of a larger sum; yet, in *Sibree* v. *Tripp*, Chief Baron POLLOCK held that the acceptance of a negotiable security may be in law a satisfaction of a debt of a greater amount. This important class of exceptions is not referred to by the learned compiler of the leading cases, although the case of *Sibree* v. *Tripp* is noticed by him. Mr. Smith, however, refers to the converse rule, which is now better established than when he wrote, and is in fact undoubted law, that even a liquidated demand, founded upon a bill of exchange or promissory note, and even though overdue, may be forgiven by word of mouth, and *à fortiori* by the acceptance of a smaller sum. Mr. Smith merely says (p. 444) that "there is authority for saying this." But Byles on Bills (p. 182) asserts that this has been determined by numerous decisions. Although he cites only two cases (*Foster* v. *Dawber*, 6 Exch. 839, and *Dobson* v. *Espie*, 2 H. & N. 79) in support of this position, yet there is no doubt that it is at the present day irrefragable, the general law merchant of the world having thus superseded the doctrine of the common law, so far as bills of exchange are concerned.

The principal case, though strictly an instance of the application of the common-law rule under consideration, is in fact a decision of a court of equity. In that case Vice-Chancellor STUART has held that an agreement to take, in lieu of arrears of income, recoverable in equity, a certain sum less than the estimated amount of such arrears, recoverable at law, is in equity void for want of consideration. This decision, therefore, is in immediate contrast with the cases placed by Mr. Smith in his third class of exceptions to the doctrine in *Cumber* v. *Wane*. To this class belong all agreements in which there is what civilians would term a novation of a previous debt, or, as we should say, a commutation of the mode of payment; thus a thousand pounds may be commuted for a peppercorn, or for a negotiable instrument of less amount; and if the new contract itself, and not its performance, be accepted in discharge of a previous liability, it will operate as a novation and satisfaction thereof, even though it be never performed.

To this category may, we think, be fairly appended every case of accord and satisfaction where a less amount than the amount due to him is accepted by the creditor, a new remedy for its recovery being superadded by the agreement. This additional element has always been considered a sufficient consideration for an agreement by a creditor to accept a composition of his claim. And even if the debt were a specialty or on bond, another bond has always been allowed to be pleaded in satisfaction, though it did not improve the plaintiff's security except

by shortening the time of payment: *Cumber* v. *Wane*, *ubi sup.* Now, an additional remedy being given to the creditor, is equivalent to shortening the time of payment, and therefore, by analogy, ought to be considered as an adequate consideration for a binding composition agreement. Nevertheless, Vice-Chancellor STUART observed, in the principal case, that he "was not aware of any authority for saying that an agreement to take 500*l.* recoverable at law, for 1000*l.* recoverable in equity, could be said to be founded upon a sufficient consideration."

We are not inclined to look with a favorable eye upon the principle involved in *Cumber* v. *Wane*, whereby the law takes upon itself to unmake the contracts of persons perfectly *sui juris*, not upon any supposed ground of public policy, but simply because it considers that the contractors have not looked sufficiently closely after their own interests. Still less are we inclined to approve of the system of first establishing a general principle, and then "frittering it away with nice distinctions." But so long as the cases to which we have adverted remain undisturbed, it is exceedingly hard to reconcile these cases with the opinion of the Vice-Chancellor in the principal case, that the fact that a debtor has given a legal remedy to his equitable creditor is not a sufficient consideration for a composition of the debt. — *Solicitors' Journal.*

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.[1]

SUPREME COURT OF MISSOURI.[2]

SUPREME COURT OF NEW YORK.[3]

BILLS AND NOTES.

Waiver of Demand and Protest.—A waiver of presentment and demand of payment of a negotiable note would imply and include a waiver of protest and of notice of non-payment, but a waiver of notice only would not be a waiver of demand. A "waiver of protest" would imply a waiver of presentment, demand, and notice. The waiver is a matter between the holder of the note and the indorser to be charged, and the agreement must be made between them: *Jaccard* v. *Anderson*, 37 Mo.

Usury.—The mere fact that a promissory note, payable in the city of New York, is made and discounted in the country, and a portion or the whole of the proceeds paid to the borrower in a draft upon the city, at the usual price or charge for city drafts, does not render such note usurious: *The Union Bank of Rochester* v. *Gregory*, 46 Barb.

Perhaps the note might be held to be usurious if both the place of payment thereof, and the purchase of the draft, were made the condition of the loan. But where nothing of that kind is shown, and for aught that appears in the finding of facts, the borrower desired a draft on the city for his own convenience, if the fact was otherwise it is for the defendant alleging the usury to prove it: *Id.*

[1] From Charles Allen, Esq., Reporter, to appear in vol. 11 of his Reports.

[2] From C. C. Whittlesey, Esq., Reporter, to appear in 37 Mo. Reps.

[3] From Hon. O. L. Barbour, Reporter, to appear in vol. 46 of his Reports.